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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1971

No. A-1061

BETTY ARONOW, Petitioner

vs.

STATE OF CALIFORNIA, Respondent

PETITION FOR WRIT OF CERTIORARI
TO THE APPELLATE DEPARTMENT OF
THE SUPERIOR COURT OF THE STATE OF CALIFORNIA
IN AND FOR THE COUNTY OF SANTA CLARA

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PETITION FOR WRIT OF CERTIORARI
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IN AND FOR THE COUNTY OF SANTA CLARA

The opinion of the Appellate Court appears in the Appendix (I). It was not reported.

JURISDICTIONAL STATEMENT

On January 11, 1972, the judgment of the Appellate Department of the Superior Court was entered affirming the conviction (Appendix II). This is the highest court for the determination of misdemeanors unless that Court grants an Application for Certification to the Court of Appeal of the questions.

On January 5, 1972, the Court denied such application of the constitutional questions (Appendix III)

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for Certification to the Court of Appeal.

Upon application of the petitioner for an order extending the time in which to file a Petition for a Writ of Certiorari, the Honorable William O. Douglas, on April 19, 1972, signed an order extending the time to and including June 9, 1972 in which to file the petition for a writ of certiorari (Appendix IV).

The jurisdiction of this Court is invoked under 28 U.S.C. §1257(3).

QUESTIONS PRESENTED

1. WHETHER THE PETITIONER WAS DEPRIVED OF DUE PROCESS UNDER THE SIXTH AMENDMENT OF THE CONSTITUTION OF THE UNITED STATES WHEN THE TRIAL COURT CUT OFF IN LIMINE ANY CROSS EXAMINATION OF THE OFFICER AS TO HIS QUALIFICATIONS TO EXPRESS AN EXPERT OPINION UPON A SUBJECT UPON WHICH ONLY AN EXPERT COULD RENDER OR EXPRESS SUCH AN OPINION

2. WHETHER THE PETITIONER WAS DEPRIVED OF DUE PROCESS UNDER THE FOURTEENTH AMENDMENT OF THE CONSTITUTION OF THE UNITED STATES WHEN THE TRIAL COURT, WHILE ADMITTING THAT IF HE HAD TRIED THE CASE IN THE FIRST PLACE, HE WOULD HAVE FOUND THAT THERE WAS NOT SUFFICIENT EVIDENCE, THAT THERE WAS REASONABLE DOUBT, DENIED HER MOTION FOR A NEW TRIAL AND GAVE AS REASONS THE FACT THAT PETITIONER HAD ASKED FOR A "JURY TRIAL", HAD COST THE TAXPAYERS $650.00 TO HAVE THE JURY TRIAL, AND HAD TAKEN A DAY AND ONE HALF TO TRY THE CASE.

STATEMENT OF THE CASE

Petitioner was convicted by a jury of violating

California Vehicle Code §21800(A) (failing to yield the right of way to a vehicle already in the intersection). A collision had occurred in the intersection. Petitioner was driving one car; Mrs. Pelz the other. Both drivers were alone. There were no percipient witnesses to the collision[1].

Two officers arrived later to investigate the accident; only one was called as a witness. Petitioner was not cited at the scene; one week later, the complaint was filed for said violation.

The sole possible testimony upon which the petitioner was convicted was that of the officer.[2]

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[1] For the complete facts, see the Certified Record of the Clerk of the Municipal Court: the complete reporter's transcript of (1) proceedings occurring at the hearing of the motion for the new trial; and (2) partial transcript of the officer's testimony. Also see the settled statement of the facts.

[2] The testimony of Mrs. Pelz was incredible upon its face. She told the officer and admitted at the trial that at the scene she had stated she was driving 20 miles per hour at the time of the collision. At the trial she testified that it was 12 miles and explained that she had come to that determination because when she "had gone back to that area and drove as she ususally does, she looked down at her speedometer and saw that the speed was 12 miles an hour." (See settled statement, page 6, lines 18--20)

Although the Court never specifically referred to her testimony, this must have been disregarded as demonstrated by the comments of reasonable doubt.

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Officer Crothers testified that petitioner had failed to yield to one who was already in the intersection. He based his opinion on two things: one, the physical evidence which he found at the scene, such as the debris, and two, the petitioner's reaction time[3]. In the absence of any objection by the district attorney, the Court, on his own, cut off in limine any question of the officer as to his qualifications to render an expert opinion upon a subject on which only a physician or psychologist could express an opinion, such as "reaction time."

The first and only question asked of the officer as to his qualifications was:

"How many courses have you had in psychology?"

The trial court broke in at this point to say:

> "Counsel we are getting way afield. Now there is no objection, but the Court will interrupt here."...Now limit your questions to the facts of this case. I don't want to go through his entire school training and tell you what courses he took.[4] (emphasis added)

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[3]Settled statement: p. 4, lines 23 -- 28. Reporter's transcript of officer's testimony, p. 2, lines 18 through 24.

[4]Same transcript as in #3, p. 4, lines 6 -- 11.

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Although petitioner made three separate attempts to explain the materiality of the desired cross examination, it was all to no avail.[5]

Petitioner then moved to strike the officer's testimony (as to petitioner's reaction time) in view of the fact that the officer's opinion as to which party was at fault was based upon petitioner's supposed or assumed 'reaction time,[6] and also moved that the jury be told to disregard it.[7] This request was also denied by the trial court.[8]

Subsequently, upon the motion for a new trial, the court, although admitting from the bench that there was reasonable doubt and that he would have found (if he had tried the case in the first place) that there was insufficient evidence, proceeded to state explicitly the real reasons for denying to petitioner her motion for the new trial:

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[5]These three attempts may be found in the partial transcript at page 4, as follows: (1) ln 12--15; (2) ln 19--21; (3) ln 25 et seq.

[6]Partial Transcript, p. 5, ln 8 -- 10.

[7]Partial Transcript, p. 5, ln 10--11.

[8]Partial Transcript, p. 5, ln 12--13.

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> "This case took a day and a half to try and it cost the taxpayers about $650.00 in a trial of this matter and that is what it cost. It cost this Court $500.00 a day to open this court. You had your jury trial; the jury found you guilty. I'm not going to disrupt that finding." (Transcript of Sentence and Motion for a New Trial, pp. 6--7).

At no time did the trial court ever refer to the testimony of either Mrs. Pelz (and her incredible story) or the non-expert Officer Crothers at the motion for the new trial.

After denying petitioner's motion, the court then pronounced sentence: $50.00 fine plus a $12.00 penalty assessment or in the alternative, one day in jail for each $10.00 of fine remaining unpaid.[9]

Petitioner appealed. She raised the same issues in the Appellate Court as she has raised herein,[10] urging that the errors required reversal.

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[9]As a result of asking for a jury trial and being convicted, petitioner incurred a 150% increase in the fine imposed. The ordinary bail for this violation is $25.00. Might this also tend to discourage innocent persons from seeking redress?

[10]Petitioner raised other errors with relation to not being permitted to cross examine, i.e., she was not permitted to ask the officer why he had not cited her at the scene of the collision. See Opening Brief filed July 30, 1971, at pages 14, 17, and 19 for a discussion of the various errors.

In the Opening Brief, petitioner, in addition to raising the errors which had occurred at the trial itself denying her the constitutional right of cross examination,[11] also raised the subsequent due-process error which had not occurred until the hearing on the motion for a new trial, when the trial court, in denying her motion, made highly prejudicial references in an angry voice, to the costs to the taxpayers when a jury trial is had,and to the time this case took (one and one-half days), and to the fact that he was not going to disrupt the jury finding,[12] even though he had first admitted that if he had tried the case in the first instance,he would have found that there was not sufficient evidence; that there was reasonable doubt.[13]

On September 28, 1971, the Appellate Court wrote its first opinion (Appendix V) wherein it dealt at length with the error pertaining to the denial by the trial court of a new trial. With respect to petitioner's other claimed errors, to wit, that the

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[11] See footnote #10, supra.

[12] See page 6 herein, supra, for exact quotation.

[13] Rep.Tr. for Jan. 5, 1971 for the complete remarks of the trial court.

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denial of the fundamental right of cross examination constituted a violation of due process, the Appellate Court casually disposed of these by holding that no prejudicial error resulted from such ruling.[14]

With respect to petitioner's contention that the trial court erred in denying her a new trial for reasons such as cost and time factors in having a jury trial, the Appellate Court apparently agreed with petitioner that the trial court had erred. In its first opinion, the Appellate Court held:

> "that to the extent that the trial court may have based his evaluation on the cost and time factors involved in a jury trial, there would be an abuse of discretion." [15]

The Court arrived at this conclusion in spite of the fact that respondent in his brief had taken one isolated sentence from the comments of the trial court at the hearing on the motion for a new trial, to wit, "but on review of the matter there is sufficient evidence to support the jury verdict"[16] followed

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[14] The Court cited Evidence Code §352 in support of this position.

[15] Original Opinion, p. 3, ln 30--p. 4, ln 2.

[16] Respondent's Brief, p. 3, ln 13--14.

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by the angry barrage of how much it had cost the taxpayers to have a jury trial) as proof of the fact that the trial court had indeed weighed the evidence.[17]

In spite of the apparent agreement with petitioner's claim that the trial court had abused its discretion in denying her motion for a new trial, the Appellate Court remanded the case for clarification instead of reversing the judgment. It held:

> "In view of the language used by the trial judge in denying appellant's motion for a new trial and his references to the cost and time factors involved in the trial, this case is remanded to the lower court for clarification, in light of the standard set by Robarge, of the grounds upon which the trial court based its denial of appellant's motion for a new trial." (Appendix V, Original opinion, p. 4)

On October 6, 1971, petitioner filed a timely petition for a rehearing (Appendix VI) wherein she directed the Appellate Court's attention to the fact that pursuant to Penal Code §1469, it could do nothing other than either affirm, reverse or modify the

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[17]Actually an examination of the complete transcript of the new trial proceedings discloses that the trial court failed to mention any of the evidence: neither the testimony of the officer on a subject which involved highly complex psychological and physiological knowledge requiring special preparation nor the preposterous testimony of Mrs. Pelz.

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judgment appealed from...and might, if proper, order a new trial. No right to remand was authorized.

Petitioner also directed the Appellate Court's attention to the fact that the errors enumerated in her Opening Brief which deprived her of the right to cross examine, had been erroneously disposed of by the Court, when it its Opinion, it had held that the said errors were not prejudicial;[18] she concisely urged that "the right to confront witnesses against one is implicit in the concept of a trial."

The Petition for Rehearing was granted.[19]

On December 15, 1971, the Modified Opinion of the Appellate Court was filed. The Court conceded that it had granted the petition for Rehearing in order to consider the question of the propriety of remanding the case to the lower court for clarification of its former ruling on the motion for a new trial. This time the Court affirmed the judgment.

Nowhere in the Modified Opinion did the Court ever once refer to the errors raised by petitioner to the

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[18] Petition for Rehearing, p.3, ln 23--p. 8, ln 7.

[19] Modified Opinion, p. 1, ln 20. (Appendix I)

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effect that prejudicial error had occurred which had prevented her from having due process accorded to her. Petitioner had referred to these errors at every opportunity that was possible: in her Opening Brief, in her Closing Brief (p. 6, ln 17--32), and in her Petition for Rehearing.[20]

On December 22, 1971, petitioner filed the Application for Certification to the Court of Appeal, First Appellate District, pursuant to the California Rules of Court, Rules 62, 63. The Constitutional questions were set forth with respect to all the errors raised (six in number). (Appendix VII)

On January 5, 1972, the Appellate Court denied petitioner's Application for Certification. This petition for a writ of certiorari was the only avenue left for redress.

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[20] Petitioner is referring specifically to the errors resulting from being deprived of the right to cross examine. She is not referring to the error which occurred at the time of the hearing on the motion for a new trial--the reference to costs.

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REASONS FOR GRANTING THE WRIT

I

THE PETITIONER WAS DEPRIVED OF DUE PROCESS UNDER THE SIXTH AMENDMENT OF THE CONSTITUTION OF THE UNITED STATES WHEN THE TRIAL COURT CUT OFF IN LIMINE ANY CROSS-EXAMINATION OF THE OFFICER AS TO HIS QUALIFICATIONS TO EXPRESS AN EXPERT OPINION UPON A SUBJECT UPON WHICH ONLY AN EXPERT COULD RENDER OR EXPRESS AN OPINION

In the case of Smith v. Illinois, 390 U.S. 129, 19 L.Ed.2d 956, 88 S.Ct. 748 (1968), it was held that "a denial of cross-examination without waiver...would be constitutional error of the first magnitude and no amount of showing of want of prejudice would cure it."[21] In that case, as in the Alford[22] case decided in 1930, the trial court had sustained objections to questions by the defense seeking to elicit the "place of residence" of a prosecution witness. In reversing Smith, the Court, quoting from Alford v. U.S., held:

> "It is the essence of a fair trial that reasonable latitude be given the cross-examiner, even though he is unable to state to the court what facts a reasonable cross-examination might

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[21] Brookhart v. Janis, 384 U.S. 1, 16 L.Ed.2d 314, 86 S.Ct. 1245 (cited in the Smith case, supra)

[22] 282 U.S. 687, 75 L.Ed. 624, 51 S.Ct. 218

develop. Prejudice ensues from a denial of the opportunity to place the witness in his proper setting and put the weight of his testimony and his credibility to a test..."

With respect to this question of residence, it was further held in Smith: "To forbid this most rudimentary inquiry at the threshold is effectively to emasculate the right of cross examination itself."

The right of an accused to be confronted with the witnesses against him must be determined by the same standards whether the right is denied in a federal or a state proceeding..."[23]

In the case herein, since the officer testified that he had concluded[24] that petitioner was at fault in the collision and since this was the only shred of unfabricated testimony which could remotely support the verdict, petitioner was prejudicially deprived of

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[23] Pointer v. Texas, 380 U.S. 400, 407, 13 L.Ed2d 923, 928, 85 S.Ct. 1065.

[24] A conclusion he did not reach at the time of the accident on Oct. 9, 1970. The complaint was issued one week later, Oct. 16, 1970. See item #1 of the Clerk's Record (Municipal Court).

This conclusion was based in part on the "reaction time" of petitioner. The officer had read in "some manual" that a person of petitioner's age had a reaction time of one second. See Settled statement, page 4, line 32.

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her day in court by being denied "this most rudimentary inquiry at the threshold", her right to cross-examine the officer as to his qualifications to express such an opinion.

An opinion on 'reaction time' requires knowledge of the physiological responses of an individual to sensory stiruli as affected by psychological affects. It would appear that only persons trained in medicine or psychology would be qualified to express an opinion on a subject as complex as 'reaction time'.

'Reaction time' can be as varied as individuals can vary. The most that could be said about the testimony of the officer is that he might have been acting in good faith; but other than that, an opinion relying on facts such as "the condition of the vehicle, the windows, these things, driving into the sun"(and not knowing whether petitioner had her visor down so as to keep the sun out) is permitting a layman, even though he is an officer, to weigh the effect of such variables on a person's ability to react.

This officer would have about the same knowledge of petitioner's reaction time as he would have of her

I.Q. He might read a 'manual' that would say that the 'average' person has an I.Q. of 100, but that is not to say that any particular individual has that specific I.Q; it might have been higher or lower.

If we take his opinion, which in itself was not such as to 'reasonably inspire confidence'[25], and add to that the fact that petitioner was denied the right of cross-examination, the prejudice suffered by petitioner deprived her of a fundamental right essential to a fair trial as guaranteed under the Constitution. As stated in **Pointer** quoting **Kirby v. U.S.**[26] where the court referred to the right of confrontation as

> "one of the fundamental guarantees of life and liberty," and "a right long deemed so essential for the due protection of life and liberty that it is guarded against legislative and judicial action by provisions in the Constitution of the United States and in the constitutions of most if not of all the States composing the Union."

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[25] **People v. Redmond**, 71 C.2d 745, 79 C.R. 529 where the court said:

> "The prosecution's burden is a heavy one; 'To justify a criminal conviction, the trier of fact must be reasonably persuaded to a near certainty. ...Accordingly in determining whether the record is sufficient in this respect the appellate court can give credit only to 'substantial evidence, ie, evidence that reasonably inspires confidence and is of 'solid value.'"

[26] 174 U.S. 47,55,56, 43 L.Ed. 890, 893, 894, 19 S.Ct. 574.

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The Sixth Amendment provides that in all criminal cases the accused shall enjoy the right 'to be confronted with the witnesses against him.' This Court has been zealous to protect these rights from erosion.[27] The Court in **Pointer** further stated:

> "...we have expressly declared that to deprive an accused of the right to cross-examine the witnesses against him is a denial of the Fourteenth Amendment's guarantee of due process of law."

The Appellate Court, being more concerned with the error of the trial court in angrily citicising petitioner because she had dared to ask for a jury trial which had cost the taxpayers $650.00, dismissed all the other errors raised by petitioner with the comment that no prejudicial error had resulted, citing California Evidence Code §352 in support thereof.[28]

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[27] Greene v. McElroy, 360 U.S. 474, 3 L.Ed.2d 1377, 79 S.Ct. 1400

[28] "The court in its discretion may exclude evidence if its probative value is substantially outweighed by the probability that its admission will (a) necessitate undue consumption of time or (b) create substantial danger of undue prejudice, of confusing the issues, or of misleading the jury."

The Court of Appeal reversed the trial court in the recent case of **People v. Mayfield**, 23 C.A.3d 256, 100 C.R. 104, decided Feb. 1972; the trial court refused to permit cross-examination of a deceased deputy sheriff's superior in a case involving the purchase of drugs under the authority of said section 352.

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This was the holding of the Appellate Court in its original opinion (Appendix V). In her petition for rehearing, she expressly called the Appellate Court's attention to the fact that §352 could not possibly be applicable to the case at bench. How could the asking of the one and only question of the witness as to what courses he had had in psychology be excluded on the ground that such question necessitated an undue consumption of time, or created substantial danger of undue prejudice, or of confusing the issues or of misleading the jury?

There could certainly be no contention that such question would tend to elicit cumulative evidence. How it could create danger of undue prejudice or of confusing the jury is still an unsolved mystery even as of today. Although the facts in the Mayfield case (See footnote #28) dealt with a hearsay accuser whereas the facts of the case at Bench deal with an alleged "expert", the holding in the Mayfield case can be made applicable to this case by the substitution of a few words:

> "The right of a defendant to attack the credibility of an expert witness testifying against her is so fundamental that consumption of time

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is irrelevant where the evidence is not cumulative.

Evidence Code §352 was never intended to apply to a situation where a witness expresses an opinion as to an ultimate fact[30] and is thereafter protected by the court from being cross-examined as to his qualifications. On the contrary, Evidence Code §721(a) provides as follows:

> "A witness testifying as an expert may be cross-examined to the same extent as any other witness and, in addition, may be fully cross-examined as to (1) his qualifications, (2) the subject to which his expert testimony relates, and (3) the MATTER upon which his opinion is based and the reasons for his opinion."

Surely a very complete and thorough cross-examination was both proper and appropriate. In its Modified Opinion, the Appellate Court's omission of any reference to petitioner's claimed highly prejudicial errors speaks eloquently for the truth of the arguments made by petitioner, not only in her Opening and Closing Briefs, but in her petition for Rehearing. The Appellate Court's refusal to comment upon the errors made by the trial court in its rulings upon the propriety of petitioner's questions did not nor could not constitute a stamp of approval of said

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error. As Justice White stated in his concurring opinion in the Smith case: (390 U.S. at 134)

> "...if the question asked is one that is normally permissible, the State or the witness should at the very least come forward with some showing of why the witness must be excused from answering the quextion.

In the case at bar, the district attorney did not object to the question. It was the court that cut off "at the threshold" any question seeking to ascertain the qualifications, training or education of the witness who expresssed an opinion that could only be given by one qualified in medicine or psychology.

Here the Court (Appellate) gave no reason justifying the refusal to permit cross examination to test the officers expertise on "reaction time."

The errors constituted a clear violation of the Sixth and Fourteenth Amendments of the Constitution; petitioner respectfully requests that this Honorable Court grant the Petition for a writ of Certiorari.

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II

THE PETITIONER WAS DEPRIVED OF DUE PROCESS UNDER THE FOURTEENTH AMENDMENT OF THE CONSTITUTION OF THE UNITED STATES WHEN THE TRIAL COURT, WHILE ADMITTING THAT IF HE HAD TRIED THE CASE IN THE FIRST PLACE, HE WOULD HAVE FOUND THAT THERE WAS NOT SUFFICIENT EVIDENCE, THAT THERE WAS REASONABLE DOUBT, DENIED HER MOTION FOR A NEW TRIAL AND GAVE AS REASONS THE FACT THAT PETITIONER HAD ASKED FOR A JURY TRIAL, HAD COST THE TAXPAYERS $650.00 TO HAVE THE JURY TRIAL AND HAD TAKEN A DAY AND ONE HALF TO TRY THE CASE

In the State of California a defendant, after conviction, may move the court for a new trial. In ruling on a motion for a new trial, the court MUST give the defendant the benefit of its independent conclusion as to the sufficiency of the credible evidence to sustain the verdict, in contrast to an appellate court which must resolve all conflicts in favor of the judgment. **People v. Robarge**, 41 C.2d 628, 262 P.2d 14; **People v. Redmond**, 71 C.2d 745, 79 C.R. 529, 457 P.2d 321. (convictions reversed in both)

Since it is the trial court that weighs the evidence and determines its credibility, the California Supreme Court in the **Robarge** case held:

> "...in the exercise of its supervisory power over the verdict, the trial court, on motion for a new trial, should consider the probative force of the evidence and satisfy itself that the evidence as a whole is sufficient to sustain the verdict...
>
> "...it should consider the proper weight to be accorded to the evidence and then decide whether or not, in its opinion, there is sufficient credible evidence to support the verdict.
>
> "It is therefore evident that the trial court failed to give defendant the benefit of its independent conclusion as to the sufficiency of the credible evidence to support the verdict." (emphasis supplied)

In the **Redmond** case, the California Supreme Court in reversing the trial court, even though the case had been tried by the court and not by a jury, held:

> "It should be pointed out that, even if the evidence were sufficient to sustain the judgment on appeal, we would be compelled to vacate the judgment, because the trial judge gave the defendant misleading advice during the proceedings on the motion for a new trial..."

In the case at bench, the trial court made it crystal clear that he would have found that there was not sufficient evidence to convict the defendant and that there was a reasonable doubt; but since the defendant had chosen to be tried by a jury that he was not going to set the verdict aside, particularly since it cost the county $650.00 to try the case, $500.00 to "open the court". The trial court left no doubt

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that he was denying the motion because petitioner had dared to have a jury trial, and second, that the trial had cost the taxpayers $650.00.[29]

Neither of these two reasons constituted legal justification for the denial of a new trial which otherwise was warranted. The cost of a trial, whether by judge or jury, is totally immaterial and irrelevant in determining whether there is sufficient credible evidence to support a conviction. Should the cost concept of a jury trial be considered, even momentarily or to any degree in determining whether to grant a new trial, the result would be catastrophic to our system of government: a government which guarantees a right to a jury trial to every defendant charged with a crime punishable by a fine or a jail sentence.

Every person charged with a crime would have to give up his constitutional right of a trial by a jury for fear that in the event of a conviction, the court would automatically deny him a new trial, even though in performing his duty, the court, upon

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29 See p. 6, supra. See Rep.Tr. pp. 6-7 of Jan. 5 proceeding.

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giving the defendant the benefit of its independent conclusion as to the sufficiency of the credible evidence concluded that the evidence was insufficient or that he had a reasonable doubt about its sufficiency; or, stating it otherwise, that the trial court did not believe that the prosecution had sustained its burden of proving the defendant guilty beyond a reasonable doubt.

If a person charged with a crime is entitled to a jury trial under the law, then any deprivation of other rights additionally guaranteed to the defendant, such as the right to have the court give its independent conclusion as to the sufficiency of the credible evidence to sustain the verdict when ruling upon a motion for a new trial, will just as effectively destroy such right to a jury trial as if such right no longer existed.

The bare conclusionary statement of the trial court that "there is sufficient evidence to support the verdict" [30] followed immediately by the angry words:

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[30] Rep.Tr. of New Trial Proceedings on Jan. 5, 1970, at page 7, line 3--4.

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["THIS CASE TOOK A DAY AND A HALF TO TRY AND IT COST THE TAXPAYERS ABOUT $650.00 IN A TRIAL OF THIS MATTER AND THAT IS WHAT IT COST. IT COST THIS COURT $500.00 A DAY TO OPEN THIS COURT. YOU HAD YOUR JURY TRIAL; THE JURY FOUND YOU GUILTY. I'M NOT GOING TO DISRUPT THAT FINDING."]

is not the equivalent of a finding that the court had considered the probative force of the evidence and found it sufficiently credible to support the finding that the defendant was guilty beyond a reasonable doubt. The probative value of evidence is not changed by the mere happenstance that the jury rather than the judge was the trier of the facts; if the court believes that there is insufficient evidence to convict, how does the evidence become sufficient simply because the jury is now hearing the case?

It is apparent from the first opinion of the Appellate Court (Appendix V) that its considered opinion was that the trial court had abused its discretion in basing its denial of the motion for a new trial on the TIME and COST factors (Original Opinion, p. 3, ln 30 - p. 4, ln 2). At that time the Appellate Court did not consider the language, to wit:

"but on review of the matter there is sufficient evidence to support the jury's verdict" to be sufficient to justify the trial court's denial of the motion for a new trial. Otherwise how can the court's ruling to remand the case for clarification be explained?

It was only after the petition for rehearing wherein the petitioner pointed out to the Appellate Court that it had no statutory authority to make such ruling (See petition for rehearing, Appendix VI) was denied, that the Appellate Court wrote another opinion it which it held that the trial court had given the petitioner the benefit of its independent determination of whether the evidence was sufficiently credible to support the verdict. The Appellate Court cited the case of **People v. Risenhoover** (1968) 70 C.2d 39, 73 C.R. 533, 477 P.2d 925 in support thereof. However, it should be noted that aside from the fact that the the trial court in the Risenhoover case stated that he would have found for the defendant because he felt that the preponderance of the evidence by defendant's witnesses would have left him with a reasonable doubt as to defendant's guilt,

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it should be noted that he also said that "no illegal evidence was received during the trial." It is petitioner's contention that she was not accorded a fair trial, that she was deprived of her very fundamental constitutional right of cross-examination, and therefore, it follows that illegal evidence was received when the trial court refused to strike the officer's testimony as to petitioner's reaction time.

Beyond all the foregoing, and most important of all, at no time did the trial court in the **Risenhoover** case ever use the intemperate language nor base his denial of the motion for a new trial on unconstitutional grounds such as the cost to the taxpayers or the time a jury trial takes to be tried. It is clear from an examination of the trial court's remarks in **Risenhoover** that he did not feel it was proper for him to substitute his judgment for that of the jury where there was no dispute as to whether the **People's** evidence was credible or not -- it was solely a question of the number of witnesses.

In the case at bench, if there were valid reasons for sustaining the verdict, the court should have stated what they were. As of the present time

the petitioner is still in the dark as to what this purportedly credible evidence consists of, since it has never yet been disclosed. The Appellate Court did not point to any evidence which it considered sufficient to justify the trial court's denial of the motion for a new trial.[31] The fact is that the ruling of the trial court was fatally tainted in that he did take into consideration the COST and TIME factors. One can safely assert that the COST factor was the motivating reason for the denial of the motion. The court used the word "cost" three different times. This surely was not the result of a slight oversight.

This Honorable Supreme Court of the United States should not decide the present case on the basis that it involved a "mere" traffic citation. The consequences of a conviction of a traffic ticket (other than the fine or jail sentence in lieu thereof) can be quite disastrous. The record will disclose that petitioner was sentenced to pay a fine of $50.00 plus a penalty assessment of $12.00, or one day in

[31] Modified Opinion, Appendix I, to which this petition for certiorari is directed.

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jail in lieu thereof for each $10.00. The usual fine is $25.00. Does a jury conviction justify a different punishment? Or is this further proof of the trial court's determination to make known to defendants in general that if they are unfortunate enough to suffer a conviction by a jury, their fines will be doubled?

The conviction and the fine imposed are not the only penalties or detriments suffered by a defendant charged with a moving violation who dares to challenge the "accusation" by asking for a jury trial.

The consequences which do not appear on the record makes one consider seriously whether to "pay the fine" and forget it or to seek vindication from one's peers, particularly if the person charged justifiably believes himself to be not guilty of the offense. Some of these consequences are the increases in insurance rate, as much as $300.00 per year for as long as 39 months. Thus it no longer is a matter of paying the $10.00 fine for a "little traffic ticket."

These citations involve one's property.

It is respectfully submitted that the trial court's denial of the new trial under the described circumstances constituted a deprivation of due process.

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III

ALTHOUGH THE FINES IMPOSED BY A STATE COURT JUDGMENT ARE SMALL, THE SUPREME COURT OF THE UNITED STATES WILL GRANT CERTIORARI TO REVIEW THE JUDGMENT WHERE THE DUE PROCESS QUESTIONS PRESENTED ARE SUBSTANTIAL

In the case of Thompson v. City of Louisville, 362 U.S. 199, 4 L.Ed.2d 654, 80 S.Ct. 624 decided in 1960, this Honorable Court granted certiorari where the defendant was convicted in a police court on two misdemeanor charges of loitering and disorderly conduct. He was found guilty of both charges and was fined $10.00 on each charge.

The city correctly admitted that if there was no support for these convictions in the record, they were void as denials of due process.

As to the loitering charge, the officer testified that defendant was in a cafe; that he had not ordered any food, and was 'shuffling' or 'patting' his feet in time to music. As to the disorderly conduct charge, the officer testified that the defendant was argumentative.

The defendant testified that he had had something

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to eat; that he was waiting for a bus. No one had complained about his 'dancing by himself' to the music. The trial court found him guilty of both loitering and disorderly conduct. There was no appeal from the police court to a state court of appeal.

The United States Supreme Court reversed the judgment and held:

> "Our examination of the record...for certiorari convinced us that although the fines here are small, the due process questions are substantial and we granted certiorari to review the police court's judgment...
>
> "..It is a violation of due process to convict and punish a man without evidence of his guilt. We find no evidence whatever in the record to support those convictions."

It was made clear in the **Thompson** case that the mere "utterance" of words by a witness does not suffice to stamp those words as constituting "evidence". The fact that the officer got up on the stand, was sworn as a witness and proceeded to give his testimony, did not preclude this Honorable Court from examining it to see whether it was sufficient to justify a conviction of the offenses.

Although the petitioner contends that the testimony of Mrs. Pelz was so incredible as to be rejecte

out-of-hand, she concedes that insofar as the officer's testimony is concerned, even though he was not there to see how the collision had occurred, it still would have been sufficient to support a conviction IF petitioner had been afforded the safeguards guaranteed under the Sixth and Fourteenth Amendments by being permitted that most fundamental right of cross examining the officer.

It is certainly prejudicial enough when an officer testifies to his own observations of events that have occurred and the court has subsequently committed error in unduly restricting cross examination: how much more is the error compounded where the officer was not a percipient witness in the first place, testified as an expert upon a subject without being qualified, and then the court not merely 'restricts' cross examination, but denies in toto any cross examination with respect to the qualifications of the expert upon whose opinion the conviction depends and without whose testimony there could have been no conviction.

In requesting this petition for a writ of certiorari, petitioner must be forthright with this Honorable Court. She is not contending that this

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case involves either her life or her liberty. She does contend that the decision below was shockingly erroneous, depriving her of due process in two separate areas. Just as in the Thompson case, supra, the punishment consisted only of a fine -- a larger one than that imposed in the Thompson case ($62.00), but nevertheless not in and of itself a reason to ask for a writ of certiorari.

Furthermore, in all candor, petitioner does not even come within that class of persons commonly referred to as "disadvantaged", with the protection of whose rights the courts are presently greatly concerned and inundated with cases. Petitioner is not on welfare, is not starving, is not a member of a minority group or otherwise deprived of the opportunity of earning a livelihood, and is not claiming special privileges by reason of being a member of the female sex. It is true that petitioner has been a practicing attorney since December, 1944, and is of the opinion that merely as an average American citizen, she is entitled to a fair trial -- not a special trial with special privileges for her, but just an ordinary trial with the safeguards provided

POO

by the United States Constitution.

An examination of the records in this case discloses the subtle and sometimes not-so-subtle pressures brought to bear upon a defendant who dares to avail himself of those rights presumably guaranteed under our United States Constitution.

Petitioner will not soon forget the experience of being berated in front of a courtroom full of attorneys for having had the temerity of having a jury trial and then being informed in front of the same courtroom-full-of-attorneys that although the court himself did not think the evidence sufficient, he would not disrupt that finding in view of what she had cost the taxpayers.

Since the jury trial was a matter of right provided by the laws of the State of California, the trial court was guilty of grievous conduct in so unmercifully and unjustifiably rebuking petitioner for having exercised that right.

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CONCLUSION

For these reasons, petitioner respectfully requests that a writ of certiorari issue to review the judgment and opinion of the Appellate Department of the Superior Court.

Dated: June 2, 1972

Respectfully submitted,

Betty Aronow

BETTY ARONOW,

Attorney for Petitioner
in propria personna

(Appendices Follow)

Appendices

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APPENDIX I

(ENDORSED)
FILED
DEC 15 1971
GEORGE E. FOWLES, Clerk
A. L. NORTON
DEPUTY

IN THE SUPERIOR COURT OF THE STATE OF CALIFORNIA

IN AND FOR THE COUNTY OF SANTA CLARA

APPELLATE DEPARTMENT

THE PEOPLE OF THE STATE OF CALIFORNIA, Plaintiff and Respondent, vs. BETTY ALTMAN ARONOW, Defendant and Appellant.	No. 347 MODIFIED OPINION

Appellant's Petition for Rehearing was granted in order that this Court might consider the question of the propriety of remanding this case to the lower Court for clarification of its former ruling on the motion for a new trial.

Upon reconsideration of this case, we find that the lower Court did exercise the proper independent determination, as dictated by Robarge, in denying appellant's motion for a new trial, and, therefore, the issue of the propriety of a remand for clarification in this case is moot.

In People v. Risenhoover (1968), 70 C2d 39, 73 Cal Rptr 533, 477 P2d 925, the California Supreme Court had under consideration a case not unlike the one before this Court. The

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lower Court in denying defendant's motion for a new trial stated:

> "Defendant's motion is based entirely on the proposition that the jury disregarded the weight of the evidence and accordingly, arrived at the wrong conclusion. With this contention the Court does not agree.
>
> "If this had been a trial before the Court without a jury, it is probable, if not certain, that in view of the definite preponderance of the factual as well as psychiatric evidence of the Defendant's mental illness and diminished responsibility, this Court would have had a reasonable doubt as to the extent of the Defendant's guilt and accordingly, not have decreed the death penalty. This statement illustrates, in view of the ruling to follow, why the Anglo-Saxons selected trial by a jury of peers as the best means of achieving a consistent justice.
>
> "This Defendant was tried before a fair and impartial jury. No illegal evidence was received during the trial. The attorneys conducted themselves according to law. The jury was fairly and impartially instructed as to the law by which they must be governed in arriving at their verdict.
>
> "Under these circumstances, it is not for one man to substitute his judgment for twelve. The motions are denied."

On review, the Court found that the trial court's statements did not show that it misinterpreted its duty, since the trial court stated that it had reviewed the authorities submitted by the defense, and those authorities included decisions such as Robarge, which clearly sets forth the trial court's duty in passing on a motion for a new trial.

Robarge states at p. 633, "... It has been stated that a defendant is entitled to two decisions on the evidence, one by the jury and the other by the court on motion for a new trial. (citations.) This does not mean, however, that the court should disregard the verdict or that it should decide what result it would have reached if the case had been tried without a jury, but instead that it should consider the proper weight to be accorded to the evidence and then decide whether or not, in its

opinion, there is sufficient credible evidence to support the verdict. (Citations.)" (Emphasis Added.)

In the instant case, in denying appellant's motion for a new trial, the trial court stated:

> "Now, if I was hearing the case in the first place, I probably would have found there was not sufficient evidence, let me put it this way; that there was reasonable doubt, but on review of the matter there is sufficient evidence to support the jury's verdict." This case took a day and a half to try and it cost the taxpayers about $650.00 in a trial of this matter and that is what it cost. It cost this court $500.00 a day to open this court. You had your jury trial; the jury found you guilty. I'm not going to disrupt that finding." (Emphasis Added.)

In view of the language used by the Court in Robarce and the opinion of the California Supreme Court in Risenhoover, this Court finds that the trial court's statement concerning the cost and time factors of the trial, in light of the Court's entire statement, does not indicate that the Court failed to give appellant the benefit of its independent determination of whether the evidence was sufficiently credible to support the verdict.

In view of the foregoing, the judgment of the lower Court is affirmed.

DATED: December 15, 1971.

Presiding Judge

We concur:

Judge

Judge

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APPENDIX II

IN THE SUPERIOR COURT OF THE STATE OF CALIFORNIA

IN AND FOR THE COUNTY OF SANTA CLARA

APPELLATE DEPARTMENT

****

THE PEOPLE OF THE STATE OF CALIF., Plaintiff and Respondent,

vs.

BETTY ULTMAN ARONOV, Defendant and Arpellant.

REMITTITUR NO. 347

MUNI. COURT NO. M9535

On appeal from the Municipal Court of SAN JOSE-MILPITAS Judicial District of the County of Santa Clara.

And now, on this day, this cause being called, and having been heretofore submitted and taken under advisement, and all and singular the law and premises having been fully considered, the opinion of the Court herein is delivered by HON. PETER ANELLO.

WHEREUPON, IT IS ORDERED, ADJUDGED AND DECREED by the Court that the Judgment of the Municipal Court of the SAN JOSE-MILPITAS Judicial District of the County of Santa Clara, in the above entitled cause, be and the same is hereby affirmed.

Presiding Judge

PETER ANELLO

We Concur

STANLEY R. EVANS
Judge

HOMER B. THOMPSON
Judge

Costs awarded on appeal to:

I, George E. Fowles, County Clerk and ex-officio Clerk of the Appellate Department of the Superior Court of the State of California, in and for the County of Santa Clara, do hereby certify that the foregoing is a true and correct copy of the original judgment entered in the above entitled cause on the 16th day of December, 19 72 and now remaining of record in my office.

WITNESS my hand and the seal of the Court, affixed at my office, this 11th day of January 19 72.

GEORGE E. FOWLES, COUNTY CLERK

By: [signature]
Appellate Clerk-Deputy

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APPENDIX III

FILED
JAN 5 - 1972
GEORGE E. FOWLER, Clerk
BY [illegible] DEPUTY

IN THE SUPERIOR COURT OF THE STATE OF CALIFORNIA
IN AND FOR THE COUNTY OF SANTA CLARA
APPELLATE DEPARTMENT

THE PEOPLE OF THE STATE OF CALIFORNIA,
Plaintiff and Respondent,
vs.
BETTY ALTMAN ARONOW,
Defendant and Appellant.

No. 347

ORDER

Good cause appearing therefor, the appellant's Application for Certification of the above-entitled action to the Court of Appeal is hereby denied.

DATED: January 5, 1972.

Peter Cullen
Presiding Judge,
Appellate Department

We concur:

Thomas R. Thompson
Judge

Judge

APPENDIX III

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APPENDIX IV

Supreme Court of the United States

No. A-1061 XXXXXXXXXXXX

BETTY ARONOW,

Petitioner

v.

CALIFORNIA

ORDER EXTENDING TIME TO FILE PETITION FOR WRIT OF CERTIORARI

UPON CONSIDERATION of the application of XXXXXXXX petitioner(s),

IT IS ORDERED that the time for filing a petition for writ of certiorari in the above-entitled cause be, and the same is hereby, extended to and including June 9, 19 72.

/s/ W. O. Douglas

Associate Justice of the Supreme Court of the United States

Dated this 19th day of APRIL, 1972.

APPENDIX V

(ENDORSED)
FILED
SEP 29 1971
GEORGE E. FOWLES, Clerk
DEPUTY

IN THE SUPERIOR COURT OF THE STATE OF CALIFORNIA
IN AND FOR THE COUNTY OF SANTA CLARA
APPELLATE DEPARTMENT

THE PEOPLE OF THE STATE OF CALIFORNIA,
Plaintiff and Respondent,
vs.
BETTY ALTMAN ARONOW,
Defendant and Appellant.

No. 347

OPINION

This is an appeal from a judgment of conviction of the Municipal Court for the San Jose-Milpitas Judicial District for violation of California Vehicle Code section 21800(a) and from the order of the trial court denying defendant's motion for a new trial.

At approximately 5:45 p.m. on October 9, 1970, defendant was involved in an automobile accident with witness Margaret Pelz at the intersection of Arroyo Seco and Peters Drive in an unincorporated area of Santa Clara County. Officer Daniel Crothers arrived at the scene and investigated the accident. Statements were taken from each of the involved parties. Defendant was not cited at the scene.

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Subsequently, on October 16, 1970, a complaint was issued against defendant for violation of California Vehicle Code section 21800(a). On Tuesday, November 6, 1970, defendant was arraigned and entered a plea of not guilty and requested a jury trial.

On December 3, 1970, the trial commenced. The People called Officer Crothers, Margaret Pelz, and Sam Pelz (husband), as witnesses. During defendant's cross-examination of Officer Crothers, the trial court refused to allow defendant's questions concerning Officer Crothers' expertise in determining defendant's probable "reaction time," and denied defendant's motion to strike the purported expert opinion. The court also refused to permit defendant to cross-examine Officer Crothers as to why he did not issue a citation to defendant at the scene of the accident, or as to why he did not file the complaint charging the violation until October 16, 1970. The court also refused to permit defendant to testify that she was not cited at the scene of the accident, although defendant was still present after the officer had obtained all the information. The court also refused to admit defendant's Exhibit A, an identification card signed by witness Margaret Pelz at the scene of the accident.

Defendant's motion for a directed verdict was denied by the trial court, and the jury returned a guilty verdict. Defendant moved the court for a new trial. On January 5, 1971, the court, after hearing, denied the motion for a new trial and sentenced defendant.

In a jury trial the defendant is entitled to two decisions on the evidence: one by the jury and another by the judge in ruling on a motion for a new trial under Penal Code, section 1181(6). The judge acting on the motion has been called "the thirteenth juror," but neither procedurally nor in function does he occupy such status: He does not deliberate with the jury in

reaching the verdict, but makes an independent determination of his own. (People v. Robarge (1953), 41 C.2d 628, 634, 262 P2d 14; People v. Redmond (1969), 71 C.2d 745, 79 Cal. Rptr. 529, 475 P2d 321.)

When an appellate court reviews the jury's verdict it resolves all conflicts in the evidence in favor of the verdict. (See Witkin, Calif. Crim. Procedure, section 683, pp. 666-667.) The function of the trial judge is entirely different: he does not review the jury's determination but weighs the evidence himself and exercises an independent judgment, as if there were no jury at all. As the court said in People v. Robarge, supra, 41 C.2d 633:

> "While it is the exclusive province of the jury to find the facts, it is the duty of the trial court to see that this function is intelligently and justly performed, and in the exercise of its supervisory power over the verdict, the court, on motion for a new trial, should consider the probative force of the evidence and satisfy itself that the evidence as a whole is sufficient to sustain the verdict." (cases cited.)

In denying appellant's motion for a new trial, the trial judge stated:

> "Now, if I was hearing the case in the first place, I probably would have found there was not sufficient evidence, let me put it this way; that there was reasonable doubt, but on review of the matter there is sufficient evidence to support the jury's verdict. This case took a day and a half to try and it cost the taxpayers about $650.00 in a trial of this matter and that is what it cost. It cost this court $500.00 a day to open this court. You had your jury trial: the jury found you guilty. I'm not going to disrupt that finding." (Transcript of Sentence and Motion, pp. 6-7.)

From the above language we are unable to determine if the trial judge properly followed the Robarge standard of giving appellant the benefit of his independent evaluation of the evidence in denying her motion for a new trial. To the extent that the trial judge may have based his evaluation on the cost and time factors

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involved in a jury trial, there would be an abuse of discretion by the lower court.

As to appellant's contentions that the trial judge committed prejudicial error in limiting the scope of her cross-examination of Officer Crothers and refusing to allow her to introduce into evidence the document completed and filled out by Mrs. Polz at the scene of the accident, this court finds, after reviewing the transcript of the lower court's proceedings, that no prejudicial error resulted from such rulings. The court in its discretion may exclude evidence if its probative value is substantially outweighed by the probability that its admission will (a) necessitate undue consumption of time or (b) create substantial danger of undue prejudice, of confusing the issues, or of misleading the jury. (California Evidence Code, section 352.)

In view of the language used by the trial judge in denying appellant's motion for a new trial and his references to the cost and time factors involved in the trial, this case is remanded to the lower court for clarification, in light of the standard set by Rehberg, of the grounds upon which the trial court based its denial of appellant's motion for a new trial.

DATED: September 21, 1971.

PETER A. [illegible]

Presiding Judge

We concur:

[illegible]
Judge

[illegible]
Judge

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APPENDIX VI

BETTY ARONOW
3136 Cadillac Drive, Suite #3
San Jose, California 95117
295-8945 or 378-0429
Attorney for defendant and appellant

(ENDORSED)
FILED
OCT 6 1971
GEORGE E. FOWLES, Clerk
R. L. NORTON
DEPUTY

IN THE SUPERIOR COURT OF THE STATE OF CALIFORNIA
IN AND FOR THE COUNTY OF SANTA CLARA
APPELLATE DIVISION

THE PEOPLE OF THE STATE OF CALIFORNIA,
Plaintiff and Respondent,
vs.
BETTY ALTMAN ARONOW,
Defendant and Appellant.

No. 347
Municipal Court
No. M 9535

PETITION FOR REHEARING

Pursuant to Rule 107 of the California Rules of Court, appellant petitions the Appellate Division of the Superior Court for a rehearing on the grounds that:

(1) The Court, in the absence of any judicial authority for permitting such procedure, erroneously remanded the case to the trial court for clarification of his former ruling on the motion for a new trial.

(2) The Court ruled that the errors complained of by appellant as having deprived her of a fair trial did not constitute prejudical error. Such ruling was highly prejudicial to the rights of appellant.

I.

UPON AN APPEAL BY A DEFENDANT, THE APPELLATE DIVISION OF THE SUPERIOR COURT MAY REVERSE, AFFIRM OR MODIFY THE JUDGMENT APPEALED FROM AND MAY SET ASIDE, AFFIRM OR MODIFY ANY OR ALL OF THE PROCEEDINGS SUBSEQUENT TO OR DEPENDENT UPON, SUCH JUDGMENT OR ORDER, AND MAY, IF PROPER, ORDER A NEW TRIAL.

PENAL CODE § 1469

Received copy
[illegible] Deputy District Attorney

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A diligent research of the law has disclosed no authority, either case law or statutory law, for the action taken by this honorable Court in remanding this case to the trial court for clarification of his ruling on the motion for a new trial. Rather, the law is to the contrary: the only action that the reviewing court may take is that which is set forth in the statute from which the Court derives its powers upon review. (Penal Code § 1469)

The reasons for not permitting a remand for "clarification" should be fairly obvious: Once a court has permitted his true feelings to be revealed as disclosed by his own words in a record taken down by a court reporter, and these words indicate that the only true motive for denying the motion for a new trial is that the defendant has had the temerity to have a jury trial instead of a court trial, and that a jury trial COSTS the TAXPAYERS (of which group appellant is a part) the huge sum of $650.00 and that it took a day and one-half to try the case, can anyone realistically believe that this same trial court would change its ruling and either grant the motion for a new trial or dismiss the action — or that this same trial court would do anything other than attempt to justify his order denying the motion for a new trial?

One could not reasonably expect a court that has denied a defendant's motion for a new trial for reasons which constitute an abuse of discretion on his part, to do anything but find some justification for said otherwise, reversible ruling. It is just not in the nature of man, even though he be a judge, to admit his error once he has been accused of error by the filing of an appeal — particularly if he were given the opportunity to come forth with new reasons for his ruling. This procedure of remanding would permit the trial court to mull over the facts to see if he could come up with some reason that would keep his decision from being reversed. Irrespective of what the trial court would say, the facts of this /particular case simply cannot support the trial court's ruling.

The thought that such a precedent, i.e., of remanding a case to the trial court for clarification of his ruling on a motion for a new trial, could be set, is frightening and presents grave constitutional questions.

The only comparable argument which tends to support appellant arises in the treatment of motions for new trials in civil actions — her contention that

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once a trial court has ruled upon a motion for a new trial, the court thereafter loses jurisdiction to make any further ruling with respect thereto, either upon the filing of the notice of appeal or upon the expiration of the time during which the trial court must rule upon the motion for a new trial.

In civil cases, the basic rule that the trial court loses jurisdiction once it has ruled on a motion for a new trial is one of general common knowledge and there is much case law to that same effect. Unfortunately, there is a dearth of authority with respect to the particular action taken by this honorable Court in remanding because it has never been done, or at least, it has never been brought to the attention of the courts in any case decided on appeal.

If a trial court that has granted a motion for a new trial on the grounds of the insufficiency of the evidence loses jurisdiction to subsequently amend its order so as to comply with the requirements of the Code of Civil Procedure § 657 that there be specification of reasons for such order, then how much more so should a trial court in a criminal case be held to have lost jurisdiction to further amend his reasons for denying a new trial!

In the fairly recent case of SCALA v. JERRY WITT & SONS, 3 C.3d 346 decided late in 1970, the Supreme Court reversed the trial court that had granted the defendant's motion for a new trial on the grounds of insufficiency of the evidence. The Order of the trial court had recited: "There is no sufficient evidence to show that the defendant was negligent and the evidence does show that the plaintiff failed to use ordinary care for his own safety and that that failure was a proximate cause of his injuries." The Supreme Court on appeal held that this insufficiently met CCP 657 requirements as amended in 1965 that there be specification of reasons. The Court cited the case of MERCEN v. PEREZ, 68 C.2d 104, decided in 1968, wherein it was held that if the new trial ground relied upon is EVIDENCE INSUFFICIENCY, the judge must BRIEFLY IDENTIFY THE PORTION OF THE RECORD which convinces him that the court or jury clearly should have reached a different conclusion. There was a lack of a simple but informative basis for the new trial order. The court said: "Specification of the reasons, phrased in terms of "ultimate facts" as defendant's freedom from negligence and plaintiff's guilt of contributory negligence, frustrates rather than promotes the legislative purpose of facilitating meaningful appellate review.

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The Court in the SCALA case, supra, cited the case of VAN ZEE v. BAYVIEW HARDWARE STORE, 268 ACA 368[1], which cited the MERCER case, and held that the judge would do well, in instances of doubt, to apply the yardstick used in the VAN ZEE and the instant case. The decision reiterated the requirements of the MERCER case.

In the case of VAN ZEE, supra, decided in 1969, with respect to the court granting a new trial upon the grounds of the insufficiency of the evidence, the court held: "To support his granting of the motion on the ground of evidence insufficiency, the judge gave the following specification: 'That the evidence is insufficient to support the verdict in that the evidence does not establish that the Zymolyte aerosol paint can was defective at any time prior to the delivery of said can to the possession of the plaintiff.' Although the law is that plaintiff is entitled to recover if the can was defective when the product was put in his hands, it is concluded that the judge was referring to the entire period up to the very moment of delivery to the customer. However the quoted ground re evidence insufficiency did not meet present CCP 657 requirements. It is true that it states the FAILURE TO PROVE THE MAIN ULTIMATE FACT in the case. Plaintiff had the burden to prove that the can was defective. But the REASON GIVEN is hardly more definite than is the STATED GROUND. MORE DETAIL WAS REQUIRED, i.e., about heating of the can, etc.

Appellant has spent a great portion of the time since the receipt of the opinion in researching the law to see if there was any authority for the ruling made by the court. Ordinarily appellant would have spent more time in writing the brief and in citing more applicable authority. However, just from the cases cited and the statute cited, it is evident, that if a procedure, such as was followed by this honorable Court, could obtain, there never would be a need for reversing a trial court for abusing its discretion in ruling upon a motion for a new trial, because all that the appellate court would have to do would be to remand the case to the trial court for further clarification.

However, the court will note that such is not the law. Where the trial court failed to specify the reasons for granting a new trial on the grounds of the insufficiency of the evidence, the order granting the new trial was ALWAYS reversed and the original judgment remained in full force.

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In appellant's case, the reasons stated by the trial court from the bench at the time of its ruling on the motion for a new trial denying such motion cannot be disregarded irrespective of what other reasons the trial court would now attribute for its ruling: it is similar to being pregnant. You either are or are not. You cannot be a "little" pregnant. So it is with Judge Robb's ruling: it is totally immaterial what 'valid' reasons he may have had in mind justifying his ruling — which could not possibly have been the case because Judge Robb admitted from the bench that he would probably have found that there was not sufficient evidence — the fact is that the ruling was tainted in that he did take into consideration the COST and TIME factors. Particularly the COST factor — he used the word "COST" THREE different times. This surely was not the result of a slight oversight. It was, in fact, the motivating reason for his ruling.

This honorable Court should not only reverse, but in view of the fact that a re-trial could only result in a verdict of not guilty, should reverse with directions to the trial court to dismiss the action against appellant. This would undoubtedly be the result upon a retrial, particularly if the appellant would have a fair trial, and not be prevented from presenting all admissible evidence.

As to the second error claimed by appellant to have been committed by the Court in the Appellate Division in its ruling with respect to the errors committed by the trial court in its rulings upon the admissibility of the evidence, etc.

II

APPELLANT MOST RESPECTFULLY DISAGREES WITH THIS HONORABLE COURT THAT THE ERRORS SPECIFICALLY ENUMERATED IN THE OPENING BRIEF AND IN THIS COURT'S OPINION on PAGE 2, lines 7--20, WERE NOT PREJUDICIAL.

Appellant does not disagree with the law as stated by the court in citing Evidence Code § 352, but disagree in the court's application of said section to the facts of this case. Certainly a court may exclude evidence if its probative value is substantially outweighed by the probability that its admission will (a) necessitate undue consumption of time or (b) create substantial danger of undue prejudice of confusing the issues, or of misleading the jury.

How do any of these examples apply to the instant case? Does this ruling

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apply to CROSS EXAMINATION? Is a party to be deprived of the right to cross exam
ENTIRELY, not just too much or repeatedly, but COMPLETELY, a witness whose testim
has not been stricken even though he has not been established as an expert with re
spect to the testimony he has given?

This Evidence Code § 352 was never intended to apply to a situation wh
a witness expresses an opinion as to the ultimate fact, such as in this case, tha
the appellant was guilty of failing to yield the right of way based on his (the
officer's) opinion of appellant's reaction time. SURELY A VERY COMPLETE AND THO
CROSS EXAMINATION WOULD BE MOST PROPER. Appellant was "cut off" practically at

In a civil case involving personal injuries, it would be inconceivable
that any witness would testify about any matter involving special knowledge witho
being thoroughly cross examined, irrespective of how long it would take. In the
experience of appellant in observing trials, the utmost leeway/is allowed when a in cross examinatio
doctor, engineer, or other expert testifies. Why should this case have been trea
ated any differently? Surely a defendant in a criminal case has as much right to pro
tect himself by being afforded a FAIR TRIAL, as a party in a civil action has. The righ
to
CONFRONT WITNESSES AGAINST ONE IS IMPLICIT IN THE CONCEPT OF A TRIAL. In fact,
when a party appears in a criminal case, various rights to which he is entitled a
usually read off to him by the judge before whom he appears, and the right to cro
examine is certainly one of those rights.

Should a defendant have his conviction brought about and then subsequen
affirmed by evidence which is one-sided and not subjected to thorough cross exami
tion? What would this do to the right of every party,(whether in a civil or crim
case) to cross examine witnesses whose testimony, if unchallenged, would support a
verdict against the defendant in a criminal case?

Furthermore, an examination of the record indicates that practically 'n
questions were allowed which would have tested the officer's expertise. The exac
questions asked of Officer Crothers on this subject of reaction time was set forth
in the transcript. Could this be considered to have been a SUFFICIENT cross exam
nation — by the stretch of anyone's imagination? The record in that regard spea
for itself.

It is the opinion of appellant that in view of the fact that this Honor

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Court was more concerned with the ruling of the trial court on the new trial issue than with the other points raised by appellant as having been erroneous, it did not give these errors the consideration which they really merited — in view of the fact that these errors did deprive her of her day in court. This is so irrespective of whether the trial Court would have conceded that he would have found the evidence to be insufficient. Errors in the admissibility or the exclusion of evidence can certainly affect the outcome of a case, and reversals are had where such errors, considered as a whole, do affect the outcome of a case.

Since appellant is filing this petition for a rehearing, she must respectfully remind the court, that all the errors, except perhaps the one dealing with the admissibility of the Exhibit A, were such as resulted in an unfair trial. The fact that 'evidence' not subjected to cross examination is sufficient to support a verdict is no basis for sustaining such verdict. Otherwise there would never be a reversal of any case except on the ground of the insufficiency of the evidence.

Furthermore it is appellant's position that there is no evidence to support the verdict. The only two witnesses who testified that appellant failed to yield the right of way were Mrs. Pelz and the Officer. Since the testimony of the Officer should have been stricken because appellant made a timely motion to strike, the only evidence remaining to support the verdict was that of Mrs. Pelz. Her testimony was such that AS A MATTER OF LAW it was both INCREDIBLE (see her explanation in the settled statement, page 6, lines 3—16; particularly lines 7 — 16) and PHYSICALLY IMPOSSIBLE. Her testimony can be compared to the testimony given in the case of LUCAS v. SO. PAC. RR., 19 C.A.3d 124, where the court held that "Even though a jury has accepted testimony, an appellate court MUST REJECT IT, if its truth is a physical impossibility. Substantial evidence must be of PONDERABLE LEGAL SIGNIFICANCE." In the LUCAS case there was a conflict of the evidence with regard to whether a crossing at a railroad was obstructed or not. The court held (on appeal) that there was no obstruction as a matter of law, in spite of the plaintiff's testimony to the contrary.

Appellant respectfully reminds this Honorable Court that the deputy district attorney conceded at the time of oral argument that Judge Robb would have found appellant to be not guilty; that he begged appellant to waive a jury trial. This

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Court will remember that I responded by saying that "my E S P was not working that day", that if I had knownthat Judge Robb would have found me not guilty I certainly would have waived the jury." Does this mean that appellant is to be 'punished' because she 'dared' to have a jury? If the evidence is of such character that the court would have found appellant to be not guilty, then how can the fact that the jury found appellant guilty (based undoubtedly on the erroneous rulings) change incredible evidence to credible?

Appellant respectfully requests this Honorable Court to examine her Exhibit "A" which was attached to her opening brief, page iii — the last page of the brief. Many hours of labor were taken to present the evidence present therein which proves conclusively and without contradiction that the collision could not possibly have occurred if the testimony of Mrs. Pelz was to be accepted as true.

The accident did occur. There is no dispute about that. However, this does not prove that the accident happened because of appellant's failure to yield the right of way. Undoubtedly it happened because Mrs. Pelz failed to yield the right of way. She undoubtedly saw appellant's car long before she entered the intersection and she just ASSUMED that she had enough time to reach the intersection before appellant did. Appellant never did see Mrs. Pelz until the moment of impact — this was because Mrs. Pelz was not in the line of appellant's vision. One should not feel too squeamish about the testimony of Mrs. Pelz. Any one who can testify two months after an event that she was driving TWELVE miles an hour, when she had told the officer at the scene that she had been traveling TWENTY miles an hour and then give the most incredible explanation as to how she determined she was going twelve miles is more than likely to place the respective automobiles in whatever place on the street that she thinks would be best to prove her side of the story.

The accident could NOT HAVE OCCURRED if appellant was one car length behind the intersection and Mrs. Pelz was 6 feet into the intersection. That was a physical impossiblity and should be rejected as such. WHAT EVIDENCE WAS THERE IN THE RECORD that was of PONDERABLE LEGAL SIGNIFICANCE to support the jury's verdict?

Appellant most respectfully request that this petition for rehearing be granted and that the trial court be ordered to dismiss the complaint against her.

Respectfully submitted

Attorney and Appellant

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APPENDIX VII

(ENDORSED)
FILED
DEC 22 1971
GEORGE E. FOWLES, Clerk
R. L. NORTON
DEPUTY

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IN THE SUPERIOR COURT OF THE STATE OF CALIFORNIA
IN AND FOR THE COUNTY OF SANTA CLARA
APPELLATE DIVISION

THE PEOPLE OF THE STATE OF CALIFORNIA, Plaintiff and Respondent, vs. BETTY ALTMAN ARONOW, Defendant and Appellant.	Appellate No. 347 (Municipal Court No. M-9535) APPLICATION FOR CERTIFICATION

To the Honorable Appellate Department of the Superior Court in and for the County of Santa Clara:

Application is respectfully made for certification of the above entitled case to the Court of Appeal, First Appellate District, Division Four,, pursuant to California Rules of Court, Rules 62, 63. Application is made on the ground that transfer is necessary to settle important Constitutional questions of law and to secure uniformity of decision:

Appellant respectfully submits that the following questions of law are involved:

1. Whether the appellant was deprived of due process under both the Constitution of the State of California and the Sixth Amendment of the Constitution of the United States when the trial court cut off in limine any cross examination of the California Highway Patrol officer as to his qualifications to render an expert opinion upon a subject upon which only an expert could render or express an opinion.

2. Whether the appellant was deprived of due process under both the

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Constitution of the State of California and the Sixth Amendment of the Constitution of the United States when the trial court refused to permit appellant to cross examine the officer as to his reason in not issuing a citation to her at the time he arrived at the scene of the accident and made his investigation, to wit, on October 9, 1970, rather than filing a complaint one week later, October 16, 1970.

3. Whether the trial court erred in refusing to admit into evidence the document signed by the other party to the accident to refute her testimony as to mental state of "being so upset."

4. Whether the appellant was deprived of due process and the right to have a fair trial when the court refused to grant her motion for a new trial by reason of the fact that she had asked for a "jury trial", had had a "jury trial", had cost the taxpayers $650.00 to have this "jury trial", had taken a day and one half to try the case, beside any other factors that the court might have considered.

5. Whether the Appellate Department of the Superior Court committed prejudicial error in remanding the case to the trial court for "clarification" of his order denying appellant her motion for a new trial when the Appellate Court held that "To the extent that the trial judge may have based his evaluation on the cost and time factors involved in a jury trial, there would be an abuse of discretion by the lower court".

6. Whether the Appellate Department of the Superior Court committed prejudicial error in subsequently disregarding the trial court's references to the cost factor and time factor of a jury trial when the said Honorable Appellate Court affirmed the trial court's order denying the appellant's motion for a new trial.

WHEREFORE, Appellant respectfully prays that this Honorable Court certify this case to the Court of Appeal, First Appellate District, Division Four.

DATED: December 21, 1971

Respectfully submitted,

Betty Aronow

Attorney for Defendant and Appellant

POINTS and AUTHORITIES

I

THE RIGHT OF CROSS EXAMINATION IS PARTICULARLY IMPORTANT IN CRIMINAL CASES

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IT IS CONSIDERED IMPLICIT IN THE CONSTITUTIONAL RIGHT OF CONFRONTATION IT IS NOT A MATTER OF PRIVILEGE BUT OF ABSOLUTE RIGHT. THE SACROSANCT NATURE AND CONSTITUTIONAL BASIS OF THE RIGHT OF CROSS EXAMINATION ARE EMPHASIZED IN THE UNITED STATES SUPREME COURT CASE OF SMITH v. ILLINOIS, 390 U.S. 129, 88 S. CT. 748, 19 L.Ed.2d 956 (1968)

18 Stanford Law Review 945

See Witkin, California Evidence, second edition, § 1198, p. 1106

also Supplement thereto (1969)

The principal application of the rule that at the trial of an action a witness can be heard only in the presence and subject to the examination of all the parties to the action if they choose to attend and examine is in criminal cases, and the Sixth Amendment guarantee of the Constitution of the United States is now held binding on the states under the 14th Amendment. See POINTER v. TEXAS, (1965) 380 U.S. 400, 85 S.Ct. 1065,1060, 13 L.Ed.2d 923; See Cal. Crim. Proc. Supp. §352. DOUGLAS v. ALABAMA, (1965) 380 U.S. 415, 85 S.Ct. 1074, 13 L.Ed. 2d 934. Cal. Crim. Proc. Supp. § 352; 13 U.C.L.A. Law Review 366; 79 HARVARD LAW REVIEW

The cases in California, such as People v. Abner, 209 C.A.2d 484, 25 C.R. 882, wherein a judgment of conviction was affirmed must be distinguished in that the record showed as follows: THERE ACTUALLY WAS CROSS EXAMINATION OF THE OFFICER WHO SAID HE COULD NOT REMEMBER THE 12 POINTS OF SIMILARITY BETWEEN THE FINGER PRINTS OF THE DEFENDANT AND THOSE LIFTED FROM THE PRINTS FOUND AT THE SCENE OF THE VARIOUS VICTIMS' WINDOW SILLS etc. As the court on page 491 of said 209 C.A.2d held:

> "...defendant cross-examined the expert at length, made no objection to the fact that the expert said that he could not remember the 12 points of similarity, did not ask that the witness be required to study the fingerprints again and return for further cross-examination, made no request for a continuance to meet the situation, and DID NOT MOVE TO STRIKE THE WITNESS' TESTIMONY." (emphasis added)

Appellant in the case presently before the Court was not permitted to ask ONE question with respect to the QUALIFICATIONS of the officer to testify to "reaction time". Appellant did move to strike the officer's testimony, all to no avail. This Honorable Court can still dismiss or reverse this case because the remittitur has not yet gone down and this court therefore retains jurisdiction.

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The court cited the case of PEOPLE v. RISENHOOVER, (1968) 70 C.2d 39, 73 Cal.Rptr. 533, 477 P. 2d 925 as authority for its ruling in affirming the judgment of the trial court in denying appellant's motion for a new trial.

Appellant most respectfully states that the Appellate Court's reliance on this case is entirely misplaced in this instance. The Court in the Risenhoover case admitted that he would have, in the first instance, found for the defendant because he felt that the PREPONDERANCE of the evidence by defendant's witnesses would have left him with a reasonable doubt as to defendant's guilt. At no time did the trial court in the RISENHOOVER case ever hint, let alone announce to an entire courtroom full of lawyers, that any person (in substance and effect) who would DARE ask for a jury trial, have a jury trial, spend $650.00 of the County's money for the jury trial, and take a day and one half for the trial, that such illegal and unconstitutional considerations had any bearing on his order denying the motion for a new trial. In fact, that court admitted that the defendant had a fair and impartial jury; that no illegal evidence was received during the trial (which is the very subject of appellant's vociferous objection to the conviction-- that she WAS NOT ACCORDED A FAIR TRIAL, BUT THAT SHE WAS DEPRIVED OF HER VERY FUNDAMENTAL CONSTITUTIONAL RIGHT OF CROSS EXAMINATION). Under those circumstances the trial court in the Risenhoover case did not feel that it was proper for him to substitute his judgment for that of the jury..

The case of PEOPLE v. REDMOND, 71 C.2d 745, 79 C.R. 529, 457 P.2d 321, was decided after the Risenhoover case, and the Supreme Court of our State reversed the trial court and held that the evidence must be substantial in order to connect a defendant with crime and that "evidence which merely raises a strong suspicion of defendant's guilt is not sufficient to support a convicion." (See page 15 of Appellant's Opening brief, lines 12--p. 17, line 23.)

Due credit must be given to the deputy district attorney who prosecuted the case. Mr. Palmer knew enough about law to realize that appellant had the right to cross examine the officer as to his qualifications. Mr. Palmer did not object to the only question asked by appellant re possible qualification. The trial court noted that fact when he said:

"Now there is no objection, BUT THE COURT WILL INTERRUPT HERE." (emphasis added) (Appellant's Opening brief, p. 16, lines 19--20)

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